

No. 9764

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MISUYE KOBAYASHI,

Appellant,

vs.

WILLIAM A. CARMICHAEL, District Director, United
States Immigration and Naturalization Service, De-
partment of Justice,

Appellee.

OPENING BRIEF OF APPELLANT.

THEODORE E. BOWEN,
615 Broadway Arcade Building, Los Angeles.
Attorney for Appellant.

FILED

APR 21 1941

TOPICAL INDEX.

	PAGE
Statement of jurisdictional matters.....	1
Statement of the case.....	2
Specifications of error relied upon.....	4
Argument	5
A. Facts	5
B. The deportation of Misuye Kobayashi is barred.....	7
C. Misuye Kobayashi was given an unfair hearing.....	8
Conclusion	9

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
McCandless v. United States, 33 Fed. (2d) 882.....	7

STATUTES.	
Immigration Act of 1917, Sec. 17.....	8
Immigration Act of 1917, Sec. 19	4, 7
Immigration Act of 1924, Sec. 3 (2).....	7
8 United States Code, Annotated, 153.....	8
8 United States Code, Annotated, 155	4, 7
8 United States Code, Annotated, 203.....	5, 7
28 United States Code, Annotated, 451.....	1
28 United States Code, Annotated, 463.....	1

No. 9764

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MISUYE KOBAYASHI,

Appellant,

vs.

WILLIAM A. CARMICHAEL, District Director, United
States Immigration and Naturalization Service, De-
partment of Justice,

Appellee.

OPENING BRIEF OF APPELLANT.

Statement of Jurisdictional Matters.

This is an appeal from an Order of the District Court of the United States, in and for the Southern District of California, discharging a Writ of Habeas Corpus and remanding Misuye Kobayashi to the custody of the United States Immigration Service.

The District Court by statute has been given power to issue writs of habeas corpus. (28 U. S. C. A. 451.)

An appeal from an Order discharging a Writ of Habeas Corpus lies with the Circuit Court of Appeals. (28 U. S. C. A. 463.)

The pleadings showing the existence of the jurisdiction are, the complaint and petition for writ of habeas corpus [Tr. of Record p. 2], and the return thereto [Tr. of Record p. 9].

Statement of the Case.

The records of the Department of Labor covering the deportation proceedings against Misuye Kobayashi have been filed with the clerk of this Court as an original exhibit pursuant to the Order of the District Court. [Tr. of Record p. 17.] Those records throughout this brief will be referred to as "Immigration File." The printed transcript of the proceedings of the District Court will be referred to as "Transcript of Record."

Misuye Kobayashi is a subject of Japan. It is undisputed that in the year 1926 she left Japan, having in her possession a valid Japanese passport and a visa thereon, issued by an American Consul, entitling her to enter the United States as a visitor. She presented herself at San Francisco December 14, 1926, when she was refused the right to enter as a visitor, but was allowed to go through the United States in transit to Mexico. While her visitor's visa was still in effect she re-entered the United States surreptitiously from Mexico in March or April, 1927, and has resided here continuously ever since. Her husband and two children are all native born American citizens, and of course are not involved in the deportation proceedings.

The deportation proceedings were not instituted until April 19, 1939, or approximately twelve years after her entry.

At the conclusion of the deportation proceedings the Secretary of Labor issued a warrant for her deportation to Japan on the following charges:

(1) "She is in the United States in violation of the Immigration Act of 1924, and at the time of entry she was not in possession of an unexpired Immigration Visa;"

(2) "She is in the United States in violation of the Immigration Act of 1924 in that she is an alien, ineligible to citizenship and not exempted by Paragraph C, Section 13 thereof."

After Misuye Kobayashi had been ordered deported and while in custody of the appellee, she filed a petition for writ of habeas corpus, alleging in substance that she had been given an unfair hearing and that her deportation was barred by the provisions of Section 19 of the Immigration Act of 1917, in that she has resided in the United States for more than three consecutive years. [Tr. of Record pp. 2 to 6.] The Writ of Habeas Corpus by order of the District Court [Tr. of Record p. 7] was issued and served [Tr. of Record p. 8], and return was duly made. [Tr. of Record p. 9.]

The evidence adduced at the hearing on the writ consisted solely of the records of the United States Immigration Service now on file with the clerk of this Court pursuant to a stipulation [Tr. of Record p. 16] and order thereon. [Tr. of Record p. 17.]

At the conclusion of the hearing the Court made its order discharging the writ and remanding Misuye Kobayashi to the custody of the Immigration service. [Tr. of Record p. 12.] From that order this appeal is prosecuted. [Tr. of Record p. 13.]

Specifications of Error Relied Upon.

Specification 1. The Court erred in holding that there was some evidence to sustain the findings on which the warrant of deportation of Misuye Kobayashi was based.

Specification 2. The Court erred in holding and deciding that Misuye Kobayashi had been given a fair hearing by the United States Immigration Service.

Specification 3. The Court erred in holding and deciding that the deportation of Misuye Kobayashi was not barred by the provisions of Section 19 of the Immigration Act of 1917. (8 U. S. C. A. 155.)

ARGUMENT.

A. Facts.

The facts in this case are in the main undisputed. The husband of the appellant, Mr. Tomekichi (Edward) Kobayashi, is a native born citizen of the United States. He married the appellant while visiting in Japan in the year 1926. (Immigration File, p. 4.) On November 24, 1926, at Yokohama she was issued a visa by an American Consul entitling her to enter the United States as a visitor under the provisions of Section 3 (2) of the Immigration Act of 1924. (8 U. S. C. A. 203.) This visa was good for one year. She presented herself at San Francisco for admission as a visitor, but for some reason not disclosed in the record, was denied entry as a visitor, but was permitted to pass through the United States in transit to Mexico, on December 17, 1926. (Immigration File, Exhibit D, p. 3.)

At Ensenada, Mexico, she and her husband again consulted an American Consul and received a letter from that Consul dated February 28, 1927 (Immigration File, Exhibit F), stating:

“Regarding application for non quota immigration visa for your wife, I have to advise that you must make petition to the Department of Labor through the Los Angeles Immigration Office. The tourist visa on your wife’s passport does not expire until the 23rd of next November, and you should have no difficulty in taking her to the United States for the short period necessary to make the petition and wait for a reply.”

On March 2, 1927, Misuye Kobayashi, armed with her passport and visitor's visa and the letter from the American Consul, presented herself for entry to the United States as a visitor at the port of San Ysidro. She was arbitrarily denied admission, although no adequate record was kept of the proceeding before the Board of Special Inquiry, as will appear from Exhibit F attached to the Immigration File which purports to be a record of the proceedings before the Board of Special Inquiry on March 2, 1927.

Thereafter and in March or April, Mrs. Kobayashi surreptitiously entered the United States and has remained here ever since.

We contend she cannot now be deported because her deportation is barred and that she has been treated unfairly by the Immigration Service in their failure to keep a record of her hearing before the Board of Special Inquiry on March 2, 1939.

B. The Deportation of Misuye Kobayashi is Barred.

There can be no question from the record but that Misuye Kobayashi did have a visa to enter the United States as a visitor at the time she entered. Her only offense, therefore, was entering without inspection, which involves a three-year period of limitation. Section 19 of the Immigration Act of 1917 (8 U. S. C. A., Sec. 155) provides in part as follows:

“ . . . At any time within three years after entry any alien . . . who enters without inspection, shall upon the warrant of the Secretary of Labor, be taken into custody and deported. . . . ”

It has been held that deportation for an entry without inspection is barred by the above statute of limitation.

McCandless v. U. S., 33 Fed. (2d) 882.

The letter of the American Consul at Ensenada (Immigration File, Exhibit F) conclusively establishes that Mrs. Kobayashi had a valid visa at the time of her surreptitious entry into the United States.

The second charge contained in the warrant of arrest falls as being armed with a visa even an alien ineligible to citizenship (Japanese) has a right to enter the United States as a visitor.

Immigration Act of 1924, Sec. 3 (2), 8 U. S. C. A.
203.

C. Misuye Kobayashi Was Given an Unfair Hearing.

We contend that if the Immigration Service had kept a record of the hearing before the Board of Special Inquiry on March 2, 1927, that that record would show that, at that time, Mrs. Kobayashi was armed with a visa as a visitor and was arbitrarily debarred from entering this country. Her visa was valid until the next November.

Counsel for Mrs. Kobayashi demanded that this record be produced and this demand was at first denied. (Immigration File, p. 7.) The so-called record was at a later date produced. (Immigration File, p. 14.) It has been attached to the Immigration File and is marked Exhibit F. It will be noted that this so-called record consisted of a shorthand notebook which could not be deciphered. It is submitted that this is no record at all.

The matter of hearings before a Board of Special Inquiry are provided for in Section 17 of the Immigration Act of February 5, 1917. (8 U. S. C. A., Sec. 153.) It is provided in said section: "Such Boards shall keep a complete, permanent record of their proceedings and of all such testimony as may be produced before them." The failure of the Immigration Service to keep this record very severely prejudices this alien in that she is entitled to have that record produced for the purpose of showing that she was not guilty of the charge that she did not have a visa when she entered the United States. Surely the essence of due process of law and fairness demands that the Immigration Service shall follow the requirements of the statute as well as their own rules and regulations.

Conclusion.

In conclusion, it is submitted that the deportation of the appellant is barred, and that she has been given an unfair hearing by the Immigration Service in that it failed to keep the statutory records.

Congress has very wisely provided a limit of time in which deportation may be instituted for various classes of offenses. This case amply illustrates the wisdom of those limitations. This lady is the mother of an excellent family. The Immigration File, pages 8 and 9, contains the testimony of a minister, a school teacher and a business man, all of whom attest to the fine character of Mrs. Kobayashi and her family. A petition was signed by many other prominent business men, teachers, farmers and housewives, all showing the hardships entailed upon a deportation merely on the ground of illegal entry after a lengthy residence in the United States. The limit of time on deportation should therefore be applied in this case.

For the reasons indicated, the judgment of the District Court of the United States, in and for the Southern District of California, should be reversed.

Respectfully submitted,

THEODORE E. BOWEN,
Attorney for Appellant.

